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No. 08-207

Supreme Court, U.S.
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In The

Supreme Court of the United States

ASPENWOOD APARTMENT CORP. AND JACK YETIV,

Petitioners,

v.

BEATRICE LINK AND HELEN HUEY,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The First District Of Texas

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Texas intermediate appellate court correctly applied state-law principles of collateral estoppel to preclude petitioners from relitigating facts and issues against respondent city officials that petitioners had previously litigated against the City of Houston.

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents, Beatrice Link and Helen Huey, respectfully request that the Court deny the petition for a writ of certiorari filed in this case.

OPINIONS BELOW

The amended opinion of Texas's First Court of Appeals (Pet. App. 1-20) is unreported, but it is available at 2007 WL 2832985. The initial opinion of the court of appeals is also unreported. The order and judgment of the district court (Pet. App. 21-22) is unreported.

JURISDICTION

The Texas court of appeals issued its opinion on September 27, 2007. The Texas Supreme Court denied a petition for review on March 28, 2008 (Pet. App. 23), and denied a motion for rehearing on May 16 (Pet. App. 24). The petition for writ of certiorari was filed on August 14, 2008. Petitioners assert that this Court has jurisdiction under 28 U.S.C. § 1257.

STATEMENT

This case arises from a dispute between the City of Houston and petitioners, owners of a low-income apartment complex, over petitioners' alleged failure

to comply with the City's ordinances regarding the repair and renovation of substandard dwellings. In 1994, the City sued petitioners to enjoin them from making repairs without proper permits. C.R. 236.[1] In 1995, petitioners filed state and federal counterclaims against the City, alleging, among other things, that the City's policies and practices regarding building permits and inspections violated state law and the First, Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution. C.R. 237. Petitioners also sued two City officials who allegedly created or ratified these policies: Helen Huey, who was a member of the Houston City Council at the time, and Beatrice Link, who was employed as the City's assistant director of neighborhood protection. Huey and Link were sued in their individual as well as official capacities. Petitioners sought damages and other relief under state law and pursuant to 42 U.S.C. § 1983.

A. Petitioners proceeded to trial against the City after their claims against respondents were dismissed or nonsuited.

In June 1997, the district court granted summary judgment for Huey on all claims against her individually and for Link on all state-law claims against her individually, but denied Link's motion as to the

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[1] All citations to the Clerk's Record, First Supplemental Clerk's Record, and Second Supplemental Clerk's Record in the court below will be made, at page *x*, as "C.R. *x*," "First Supp. C.R. *x*," and "Second Supp. C.R. *x*," respectively.

federal constitutional claims against her individually. C.R. 190. Anticipating that Link would file an interlocutory appeal, which would have delayed the trial of petitioners' claims against the City, petitioners dismissed all of their federal claims against Link in her individual capacity.[2] C.R. 192.

In August 1997, petitioners proceeded to trial against the City. The district court only charged the jury on petitioners' federal claims. C.R. 194-95. The jury found against petitioners on their First Amendment claim but found in their favor on the unlawful search and due process claims relating to the inspection of property and the withholding of permits. C.R. 194. The district court therefore rendered judgment against the City, which appealed to Texas's First Court of Appeals. Petitioners also appealed, challenging the pretrial summary judgments in favor of Huey and Link.

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[2] Texas law, like federal law, permits public officials to obtain interlocutory review of a pretrial ruling denying immunity. See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5) (Vernon 2008); *cf. Behrens* v. *Pelletier*, 516 U.S. 299 (1996). Petitioners acknowledged in their response to Link's motion for summary judgment that they dismissed the Section 1983 claims against Link precisely to avoid a delay of the trial against the City and because they "believed that they could be made whole by proceeding against the City alone. . . ." C.R. 67 n.1.

B. The Texas court of appeals resolved the claims favorably to the City.

In 1999, the Texas court of appeals reversed the judgment against the City and rendered judgment in its favor, holding that the district court erred in submitting jury instructions that impermissibly allowed the jury to impose respondeat superior liability against the City. *City of Houston* v. *Aspenwood Apartment Corp.*, No. 01-97-01378-CV, 1999 WL 681939, at *7 (Tex. App. – Houston [1st Dist.] Aug. 27, 1999, pet. denied) (not designated for publication), *cert. denied*, No. 02-496, 537 U.S. 1047 (2002). The court observed that, under *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), a municipality may not be held vicariously liable for injuries caused by its employees unless the employees were acting pursuant to an unconstitutional custom, practice, or policy sanctioned by the municipality's final policymaker. The court held as a matter of law that there was no evidence that the City maintained a custom, practice, or policy of withholding permits or illegally searching low-income housing. 1999 WL 681939, at *7, *11. Petitioners unsuccessfully sought review of this decision in the Texas Supreme Court and in this Court. See 537 U.S. 1047.

The court of appeals also reversed the summary judgment in favor of Huey on petitioners' state and federal claims, and it reversed the summary judgment in favor of Link on their state-law claims. 1999 WL 681939, at *18-*19. The court of appeals did not hold, as petitioners suggest, that "significant

evidence existed of constitutional wrongdoing" to negate immunity as to Huey or Link. Pet. 3. The sole basis of the court's reversal was its determination that there were questions of fact. Indeed, as to Link, the court expressly declined to address the Section 1983 claims "as these were nonsuited before trial." 1999 WL 681939, at *21.

C. The Texas district court later rejected, on several state-law grounds, petitioners' attempt to reinitiate the claims against respondents.

Upon remand, Huey filed special exceptions, a Texas procedural device that permits litigants to object to pleadings that are facially defective. Second Supp. C.R. 1-8. Huey argued that petitioners' claims were barred by collateral estoppel. *Ibid.* The district court agreed with Huey, and petitioners were ordered to replead or to risk dismissal of their claims. First Supp. C.R. 12. Petitioners declined to replead, and the claims against Huey were dismissed in December 2004. First Supp. C.R. 178.

In January 2005, petitioners filed a second amended petition that deleted the City as a defendant and dropped two tort claims (for malicious prosecution and abuse of process), but alleged the same facts and incidents as their previous pleading. C.R. 66. Petitioners also attempted to reassert the Section 1983 claims against Link that they had strategically dismissed eight years earlier. *Ibid.* Link

moved for summary judgment, asserting collateral estoppel, res judicata, statute of limitations, and certain other defenses available under Texas law. C.R. 83. The district court granted the motion and rendered a final judgment against petitioners on all claims. Pet. App. 21-22.

D. The Texas court of appeals affirmed the district court's decision based on state-law principles of collateral estoppel.

Petitioners appealed Link's summary judgment and the granting of Huey's special exceptions. Texas's First Court of Appeals affirmed, holding that petitioners were collaterally estopped from pursuing the Section 1983 claims against Link and Huey. Pet. App. 9. The court concluded that assertion of the federal claims against Link and Huey would require relitigation of facts and issues that were essential to the judgment against the City; thus, state-law principles of collateral estoppel prevented those claims from going forward. *Ibid.* In its opinion, the Texas court relied on settled state law on collateral estoppel, and it applied those principles on a claim-by-claim basis. Pet. App. 6-17, 19-20.

Specifically, the court of appeals observed that claimants under Section 1983 must show that they were deprived of a constitutional right by a person acting "under color of state law." Pet. App. 7-8. The court further stated that this element requires a showing that Huey and Link were state actors at the

time and that their conduct was "fairly attributable" to the State. Pet. App. 7 (citing, *inter alia*, *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982)). After reviewing the "under color of state law" issue and the manner in which petitioners had pleaded their claims, the court of appeals held that petitioners could not establish the "under color of state law" element of their Section 1983 claims without relitigating the same underlying facts and issues that were litigated against the City. Pet. App. 9-10. The court also determined that collateral estoppel applied to most of petitioners' state-law claims.[3] Pet. App. 19-20.

The Texas Supreme Court declined to review the judgment of the court of appeals. Pet. App. 23-24.

REASONS FOR DENYING THE PETITION

The Texas court of appeals' unreported memorandum opinion involved nothing more than the fact-bound application of settled state-law principles of collateral estoppel. The decision did not resolve any

[3] The court held that the malicious prosecution and abuse of process claims were not barred by collateral estoppel because the issues surrounding those claims were not fully and fairly litigated in the trial against the City. Pet. App. 16. It concluded, however, that these two state-law tort claims had been abandoned against Link, though it did not consider whether the claims had likewise been abandoned against Huey. Pet. App. 19-20.

substantial federal questions and, as a result, this Court has no jurisdiction to review it. At the least, the ruling below does not warrant this Court's consideration because it does not conflict with any decision by this Court, and petitioners do not allege that it creates a conflict with any federal court of appeals or state court of last resort. In addition, this Court's resolution of the question presented by petitioners is highly unlikely to affect the outcome below. Not only did the Texas court not address that question, but there are alternative state-law bases that would independently support the outcome in respondents' favor. For these reasons, the petition should be denied.

I. This Court Has No Jurisdiction To Review The State-Law Ruling Below Or, At Minimum, There Is No Issue Warranting The Grant Of Certiorari.

A. The Texas court merely applied settled principles of state preclusion law and did not hold that a "policy or custom" requirement applies in Section 1983 suits against individuals.

Petitioners' only contention in favor of certiorari is that an unpublished opinion of a Texas intermediate appellate court held that a Section 1983 claimant suing individual officers in their personal capacity must establish the "policy or custom" element that applies in suits against municipalities. Pet. 6, 9-11. Indeed, petitioners represent that this was "the primary issue addressed" in the opinion (Pet. 4) and

that the Texas court "repeatedly stated" this holding (Pet. 11). Petitioners' portrayal of the lower court's decision is wrong, however. The court never held – expressly or otherwise – that the "policy or custom" element applies in Section 1983 cases against individuals. And there is no dispute here over the proper resolution of that question. Petitioners' sole basis for seeking this Court's review is therefore fundamentally misplaced.

A simple reading of the court's opinion shows that the only question below was the proper application of Texas law regarding collateral estoppel to the facts of this case. See Pet. App. 4-10. After petitioners exhaustively – though unsuccessfully – pursued their Section 1983 claims against the City of Houston based mostly on the conduct of its individual officers (respondents here), they re-initiated this suit against respondents and claimed constitutional and state-law violations stemming from the same basic conduct. Pet. 2-4. Huey filed special exceptions based on Texas's doctrine of collateral estoppel, which led to the dismissal of petitioners' claims against her. Pet. App. 4. Link filed a motion for summary judgment grounded on a variety of state-law doctrines, including collateral estoppel, and the district court granted the motion without specifying the doctrine on which it relied. *Ibid.* Petitioners appealed these rulings to Texas's First Court of Appeals, arguing (as relevant here) that collateral estoppel did not apply to their suit against Huey and Link. Pet. App. 4-5.

Thus, the court below was asked simply to apply state-law principles of collateral estoppel to this case. Pet. App. 4-5, 17-19. In the relevant portions of petitioners' appellate briefs, for instance, they simply argued about the proper application of collateral estoppel based on a comparison of what was litigated in the prior suit against the City of Houston – including what the court of appeals held in its earlier decision – and what is at issue in the present suit against Huey and Link. See Br. of Appellants 6-7, 23-24 (Oct. 5, 2005). Respondents likewise focused on a comparison of the issues and facts that were previously litigated and the ones at issue in this case based on petitioners' pleadings. See Br. of Huey 4-12 (Nov. 7, 2005); Br. of Link 3, 18-20 (Nov. 7, 2005).

In its opinion, the Texas court of appeals quoted settled state-law principles of collateral estoppel, Pet. App. 6, and it applied those principles on a claim-by-claim basis, Pet. App. 6-17, 19-20. Based on this fact-intensive analysis, the court determined that collateral estoppel did not apply to two of petitioners' state-law tort claims, but that it did apply to their federal claims under Section 1983, their state-law constitutional claims, and their third state-law tort claim. Pet. App. 6-17, 19-20. Specifically, the court held that collateral estoppel barred most of petitioners' claims because the facts and issues that petitioners sought to litigate under them had already been fully and fairly (and unfavorably) litigated with the City of Houston, and because the prior determination of

those issues was essential to the judgment between petitioners and the City. Pet. App. 6-14.

In reaching that conclusion with respect to petitioners' federal claims, the court of appeals properly stated and applied the law on Section 1983. It explained that, in a Section 1983 suit against individuals such as Huey and Link, petitioners must show that they were deprived of a constitutional right and that the deprivation was committed "under color of state law." Pet. App. 7-8 (citing, *inter alia*, *Am. Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 50 (1999)). The court further stated that the "under color of state law" element requires a showing that Huey and Link were state actors at the time and that their conduct was "fairly attributable" to the State.[4] Pet.

[4] Petitioners incorrectly argue that the only showing required for the "under color of state law" element is that "the actions were taken by a municipal employee," and further that it is "absolutely" irrelevant whether an employee's actions were "fairly attributable" to the State. Pet. 10-11. In fact, Section 1983 is implicated only when state action is involved, a requirement that is enforced through the "under color of state law" element. See, *e.g.*, *Brentwood Acad.* v. *Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 n.2 (2001). Even a public employee acts under color of state law only when he is "exercising his responsibilities pursuant to state law" – as distinct from when he is acting as a purely private person – such that his conduct is fairly attributable to the State. *West* v. *Atkins*, 487 U.S. 42, 50 (1988). Put another way, regardless of whether a defendant is a private actor or a public employee, state action can be found only where a challenged action "may be fairly treated as that of the State itself," which requires that the individual's conduct be "fairly attributable" to the State. *Brentwood*, 531 U.S. at 295 (internal quotation marks omitted); see

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App. 7 (citing, *inter alia*, *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982)).

The court of appeals then described petitioners' pleadings as alleging that Huey and Link were the ones – along with the City Council – who created or ratified the allegedly unconstitutional policies or customs of which petitioners complain. Pet. App. 8. Yet the earlier appeal by the City had established that there was "no evidence" of such practices or policies. Pet. App. 9. Thus, the court of appeals concluded that petitioners could not prove the "under color of state law" element of their claims in this case – *i.e.*, that Huey's and Link's actions are attributable to the City – without relitigating the same underlying facts and issues that were litigated against the City. *Ibid.* The court emphasized that its decision rested on how petitioners had pleaded their claims against Huey and Link: they failed to "allege conduct separate and apart from the issues already litigated against the City."[5] Pet. App. 9-10.

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also Am. Mfrs. Mut. Ins. Co., 526 U.S. at 50-51; *Rossignol* v. *Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003).

[5] Petitioners make much of the court of appeals' statement that "'[r]elitigation of these same issues would be necessary in [the] current action.'" Pet. 10 (emphasis omitted; quoting Pet. App. 9). But the court made plain in that paragraph that "these same issues" referred to the underlying issues – "the facts surrounding these alleged policies and customs" – and not to the "policy or custom" issue itself. Pet. App. 8-9. In addition, later in that sentence the court made clear its understanding of what requirement applies in this case: in the "current action,"

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As this summary makes clear, the court of appeals did not hold that petitioners – or any other Section 1983 claimant – must establish the "policy or custom" element in a suit against individual officers. The court repeatedly acknowledged that petitioners' burden in this case was to meet the "under color of state law" element, and it carefully discussed that concept separately from the "policy or custom" element at issue in the prior suit. Pet. App. 7-9. The court simply held that, based on how petitioners have pleaded their case, the underlying facts and issues to be litigated to satisfy the "under color of state law" element have already been fully and fairly litigated. Pet. App. 9. That narrow, fact-bound determination is not tantamount to a holding that the elements are the same, and it cannot plausibly be read as incorporating the "policy or custom" element into all Section 1983 cases.[6]

Indeed, there is no dispute between the parties here that the "policy or custom" requirement is inapplicable to Section 1983 suits against officers in their personal capacities. The "policy or custom" requirement was established by this Court specifically to

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petitioners must show that respondents' "actions could be fairly attributed to the City so that it may be said that [they were] acting 'under color of state law.'" Pet. App. 9.

[6] Similarly, and contrary to petitioners' claim (Pet. 6, 13), there is no plausible way to read the court of appeals' decision as incorporating the "policy or custom" element into all state constitutional and tort claims.

limit the liability of municipalities under Section 1983 to their own impermissible actions, thus prohibiting liability on a respondeat superior basis. See *Monell* v. *Dep't of Social Servs.*, 436 U.S. 658, 691-94 (1978). The Court has since made clear that the "policy or custom" element has no application in Section 1983 suits against officers in their individual capacities, based on unlawful activities in which they engaged under color of state law. See *Hafer* v. *Melo*, 502 U.S. 21, 25 (1991).

In sum, the question that petitioners present for review was neither presented to nor decided by Texas's First Court of Appeals, and it is not disputed between the parties here. Strikingly, petitioners do not even mention in their petition that the Texas court's ruling turned on state-law principles of collateral estoppel. Petitioners' attempt to increase their chances for review by focusing on an abstract legal question that was not at issue must fail.[7]

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[7] So, too, should petitioners' warnings of doom be disregarded. Pet. 6. Because the Texas court of appeals did not hold that Section 1983 claimants must meet the "policy or custom" requirement when suing individual officers, there is no cause to fear that "individual 'Rambo' governmental actors" (*ibid.*) will invoke that requirement in future cases. And, for that reason (among others), the claim that "§ 1983 would be gutted and rendered almost meaningless" (*ibid.*) by the unpublished decision below is empty rhetoric. Like the court below, other Texas courts have not imposed a "policy or custom" requirement in Section 1983 cases against individual defendants, but instead have properly cited and relied on this Court's individual-liability precedents in evaluating claims against public officials. See, *e.g.*,

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B. This Court has no jurisdiction over the Texas court's state-law ruling, and in any event that ruling does not warrant review.

The issue actually resolved below – how Texas law of collateral estoppel applies in this case – is not properly reviewable by this Court, nor does it warrant this Court's consideration in any event. This Court's review of state-court decisions is limited to substantial federal questions. See, *e.g.*, GRESSMAN, ET AL., SUPREME COURT PRACTICE 180-83 (9th ed. 2008). Here, the only federal issue that petitioners claim the Texas court decided – whether the "policy or custom" requirement from *Monell* applies in Section 1983 suits against individual officers – was, in fact, neither raised in nor decided by the First Court of Appeals, and there is no controversy between the parties on the question. See Part I.A., *supra*. The only issue resolved by the Texas court of appeals was whether Texas's doctrine of collateral estoppel applies to petitioners' suit. This Court has no jurisdiction to review that state-law ruling.

Poteet v. *Sullivan*, 218 S.W.3d 780, 787 (Tex. App. – Fort Worth 2007, pet. denied), *cert. denied*, No. 07-10992, 2008 WL 2127111 (U.S. Dec. 1, 2008); *Padilla* v. *Mason*, 169 S.W.3d 493, 501-02 (Tex. App. El Paso 2005, pet. denied); *Perry* v. *Greanias*, 95 S.W.3d 683, 699-700 (Tex. App. Houston [1st Dist.] 2002, pet. denied).

Even if this Court could review the decision below, it raises no issue worthy of this Court's consideration. Most significantly, the ruling does not conflict with any decision by this Court. While petitioners claim that the ruling contradicts this Court's statement that the "policy or custom" element applies only in the municipality context, that claim is wrong because, as explained in Part I.A. above, the court below did not hold or suggest to the contrary. In addition, petitioners have not claimed that the Texas court's application of state preclusion principles is inconsistent with a decision of this Court. Finally, petitioners have not alleged any conflict with a decision by a federal court of appeals or state court of last resort.[8]

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[8] Petitioners suggest that the Texas Supreme Court denied review because it did not believe that its "conflicts jurisdiction" extends to conflicts with decisions of this Court. Pet. 5-6. This suggestion is spurious for two reasons. First, in opposing review of this case in the Texas Supreme Court, respondents pointed out (as they do here) that petitioners misunderstood or mischaracterized the First Court of Appeals' ruling, and that the court of appeals merely resolved the collateral-estoppel issue on the facts before it. The supreme court then denied the petition for review rather than dismissing it for want of jurisdiction, which indicates that the court concluded it had jurisdiction but chose not to exercise it. See Tex. R. App. P. 56.1(b); Pet. App. 23. Second, no conflict was necessary for the supreme court to exercise jurisdiction over this appeal because it was taken from a final judgment. See TEX. GOV'T CODE ANN. §§ 22.001(a)(6), 22.225(b)(3), 22.225(c) (Vernon 2004); Pet. App. 21-22. The unrelated case to which petitioners refer addressed a narrower statutory grant of jurisdiction to hear *interlocutory* appeals when the decision under review conflicts with the Texas Supreme Court's

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At most, then, petitioners' claim is that review is warranted because the court below misapplied Texas collateral-estoppel law. But it is plain that the Texas court's application of state law was not founded upon a misconception of federal law, because the Texas court repeatedly recognized that petitioners had to meet the "under color of state law" element and it carefully discussed that concept separately from the "policy or custom" concept at issue in the prior suit against the City. See Part I.A., *supra*. Thus, if there was an error in the decision below, it was one of state law or one based on a misreading of petitioners' pleadings or the prior Texas appellate decision. Such fact-bound errors would not warrant this Court's consideration, and indeed this Court has no jurisdiction to review the Texas court's application of state collateral-estoppel principles.

Furthermore, it is not clear that the Texas court's ruling was erroneous. Petitioners have chosen to argue that Huey and Link were acting under color of state law at the time of their conduct, such that their actions were attributable to the City, based on largely the same factual allegations that they previously asserted against the City – allegations that are

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or a lower Texas court's rulings. See *County of Dallas* v. *Sempe*, 262 S.W.3d 315 (Tex. 2008) (per curiam). In *Sempe*, the Texas Supreme Court did not even reach the question whether that narrow grant of jurisdiction extends to conflicts with this Court's decisions because it held that the lower court's decision there did not conflict with this Court's decisions. *Id.* at 315-16.

uniquely aimed at proving Huey's and Link's participation in creating or ratifying a "policy or custom" of unconstitutional conduct. In the previous appeal, the court of appeals held that there was "no evidence" of any "policy or custom," and in reaching that conclusion it dealt specifically with Huey's and Link's conduct. 1999 WL 681939, at *6-7, *12. The Texas court's application of collateral estoppel in these narrow circumstances is reasonable.

In conclusion, there is no justification for this Court's review of the unpublished decision below. It did not decide any significant federal questions, it does not conflict with any ruling by this Court or cause a split of authority among federal or state courts, and it is consistent with federal and state law. The petition for writ of certiorari should be denied.[9]

II. This Court's Resolution Of The Question Presented By The Petition Is Unlikely To Affect The Outcome Below.

Even if this Court were interested in addressing the question formulated in the petition, this case does not offer a suitable vehicle for doing so. As explained above, the legal issue that petitioners ask this Court

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[9] For the same reasons, this Court lacks jurisdiction to review the Texas court of appeals' application of state collateral-estoppel principles to petitioners' *state*-law claims – especially their tort-based claims. *Cf.* Pet. 13. Furthermore, the court's disposition of those claims creates no conflict and is not certworthy.

to resolve – whether the "policy or custom" requirement applies in Section 1983 suits against individual officers – was not briefed or decided in the court of appeals, and indeed the parties do not disagree about the proper resolution of that issue. Simply put, if this Court were to grant certiorari and hold that the "policy or custom" element does not apply in Section 1983 suits against individual officers, it would not affect the ruling below because the Texas court did not hold (or apparently believe) otherwise.

Such a holding is also unlikely to affect the judgment below because respondents have several adequate defenses under state and federal law, each of which would independently support a decision in their favor. In addition to collateral estoppel, Link's motion for summary judgment relied on the statute of limitations, the Texas Tort Claims Act bar, state-law principles of res judicata, and the state compulsory counterclaim rule. C.R. 88-101. The district court did not specify the basis for its decision to grant Link's motion, nor did the Texas Supreme Court specify its reasons for denying review. Pet. App. 21, 24. Thus, although the court of appeals chose to address only collateral estoppel, the summary judgment may be affirmed on any of these grounds. See, *e.g.*, *Jones* v. *Hyman*, 107 S.W.3d 830, 832 (Tex. App. – Dallas 2003, no pet.). Moreover, although Huey's special exceptions to petitioners' Section 1983 claims were based on collateral estoppel, she would have the opportunity to file her own summary judgment

motion raising many of these same defenses in the event of a remand.

These defenses are more than adequate to support a judgment for respondents. Most obviously, petitioners' Section 1983 claims against Link were filed well after the applicable two-year statute of limitations had expired. See *Whitt* v. *Stephens County*, 529 F.3d 278, 282 (5th Cir. 2008). The events about which petitioners complain occurred in 1994. C.R. 69-78. Although petitioners originally sued Link in 1995, they made a tactical choice in 1997 to dismiss their federal claims against Link individually to avert an interlocutory appeal, and they did not refile those claims until 2005. C.R. 66, 192; see p. 3 n.2, *supra*. Under Texas law, claims that have been dismissed and are later refiled do not relate back to the original pleading for purposes of calculating the limitations period. *Clary Corp.* v. *Smith*, 949 S.W.2d 452, 459-60 (Tex. App. – Fort Worth 1997, pet. denied). Thus, respondents' 2005 claims against Link came several years too late. See *Evans* v. *Tex. Dep't of Pub. Safety*, No. 05-96-01038-CV, 1998 WL 548852, at *7 (Tex. App. – Dallas Aug. 31, 1998, no pet.) (not designated for publication).

To take but one other example, the Texas Tort Claims Act bars petitioners' claims against both Link and Huey. The version of the Act applicable to this case provides that "[a] judgment in an action . . . under this [Act] bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave

rise to the claim."[10] Here, petitioners' action falls under the Act because they originally sued the City of Houston for intentional torts, including malicious prosecution and tortious interference with contract, as well as for an injunction compelling the issuance of building permits.[11] The requirement of a judgment is also met: petitioners obtained a judgment against the City that included an injunction against enforcing its permitting ordinance (C.R. 196, 199), and the Texas court of appeals later reversed and rendered

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[10] Act of May 17, 1985, 69th Leg., ch. 959, § 1 (amended 2003) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 101.106 (Vernon 2005)). Petitioners have argued that Link cannot rely on this section because the court of appeals ruled against her position in the 1999 appeal. Not so. The court of appeals merely declined to consider this section as an alternative ground to affirm the 1997 summary judgment because Link had not raised it in the district court (given that there was no judgment against the City yet). 1999 WL 681939, at *22. Nothing in the court's opinion prevented Link from invoking that section in a new summary judgment motion filed after remand, which she did. C.R. 88-95.

[11] C.R. 180-81; see *Mission Consol. I.S.D.* v. *Garcia*, 253 S.W.3d 653, 658-59 (Tex. 2008) (holding that all tort theories against governmental unit fall under Act); *Brown* v. *Xie*, 260 S.W.3d 118, 122 (Tex. App. – Houston [1st Dist.] 2008, no pet.) (holding that request for injunctive relief falls under Act); see also TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a)(28) (Vernon 2005) (defining building codes and inspection as governmental function for which municipality can be held liable under Act). Petitioners later dropped some of their tort claims against the City, but it is their original claims that determine whether this statutory bar applies. *Brown*, 260 S.W.3d at 122.

judgment for the City.[12] Finally, as explained in Part I.A. above, petitioners' claims against city officials Link and Huey involve the same subject matter as their claims against the City.[13] Accordingly, petitioners' choice to pursue claims against the City bars this action against its officials.

For these reasons, this Court's review is highly unlikely to affect the ruling below or to change the outcome of this litigation. Given these significant vehicle problems, this Court should not grant the petition.

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[12] 1999 WL 681939, at *12; see *Dallas County Mental Health & Mental Retardation* v. *Bossley*, 968 S.W.2d 339, 343-44 (Tex. 1998) (holding that judgment in favor of governmental unit triggers statutory bar).

[13] See *Bossley*, 968 S.W.2d at 344 (defining "same subject matter" broadly as "arising out of the same actions, transactions, or occurrences") (internal quotation marks omitted); *White* v. *Annis*, 864 S.W.2d 127, 130 (Tex. App. – Dallas 1993, writ denied) ("The statute does not require that the suit against the employee be brought under the Tort Claims Act for actions against the employee to be barred.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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